

WONG JOO SEN

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v.

PP

FEDERAL COURT, PUTRAJAYA
RICHARD MALANJUM CJ (SABAH & SARAWAK)
HASHIM YUSOFF FCJ
JAMES FOONG FCJ
[CRIMINAL APPEAL NO: 05-40-2008 (P)]
27 JULY 2010

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CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in 117.5 grams of methamphetamine - Appeal against conviction and death sentence - Evidence of arresting officer, reliability of - Mens rea possession, whether established - Whether conduct of accused at time of arrest indicative of knowledge - Whether there was misdirection on standard of proof by trial judge*

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CRIMINAL PROCEDURE: *Witness - Credibility - Reliability of evidence of arresting officer - Arresting officer's testimony pivotal to prosecution's case - Whether reasonable and logical for trial judge to have believed and accepted testimony wholly*

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CRIMINAL PROCEDURE: *Mens rea - Trafficking in dangerous drugs - Whether mens rea possession established - Conduct of accused at time of arrest, whether indicative of knowledge*

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EVIDENCE: *Witness - Credibility of - Reliability of evidence of arresting officer - Arresting officer's testimony pivotal to prosecution's case - Whether reasonable and logical for trial judge to have believed and accepted testimony wholly*

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EVIDENCE: *Standard of proof - Trafficking in dangerous drugs - Ruling by trial judge that defence failed to cast doubt on truth of prosecution's case - Whether trial judge committed a misdirection*

The appellant was convicted and sentenced to death by the High Court on a charge of trafficking in 117.5 grams of methamphetamine under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('Act'). His appeal to the Court of Appeal was dismissed, resulting in the present appeal in which the following issues were raised: (i) the reliability of the evidence of the arresting officer ('PW5') and whether *mens rea* possession had been established; and (ii)

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- A misdirection on the standard of proof by the trial judge. On the issue of PW5's reliability, the appellant submitted, *inter alia*, that the trial judge should have been cautious in accepting PW5's evidence since his testimony was pivotal to the prosecution's case. It was then averred that in reaching her conclusion on the issue of
- B *mens rea* possession, the trial judge erred in merely accepting that the appellant's act of running to the bathroom and throwing something was conduct or an overt act indicative of knowledge. (PW5 had subsequently found three packages containing the proscribed drug in said bathroom). In respect of the second issue
- C raised, the appellant asserted that the trial judge committed a misdirection when she ruled that the defence failed to cast doubt on the truth of the prosecution's case.

Held (dismissing the appeal, and affirming the trial court's conviction and sentence)

- D **Per Richard Malanjum CJ (Sabah & Sarawak) delivering the judgment of the court:**

- (1) From the evidence recorded, there was no basis to say that the trial judge was not careful and too ready to accept the evidence of PW5 in his narration of the events leading to the recovery of the packages in the bathroom of the appellant's bedroom. In fact, there was no evidence to suggest that it was unreasonable and illogical for the trial judge to have believed and accepted wholly PW5's testimony. As such, this was not a case in which the concurrent findings of fact of the courts below should be interfered with. Although PW5, on the facts, went to the appellant's house armed with information received and was thus interested in finding out if said information was correct, that did not necessarily make him an untrustworthy witness. PW5 went to the house with other police personnel and there was nothing adduced to indicate that PW5 had a reason to accuse the appellant of any offence. There was also no evidence adduced to show that PW5 had known the appellant before. Therefore,
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- there was no merit in the issue pertaining to PW5's reliability as a witness establishing the key elements of the offence as charged. It should also be noted that PW5's evidence was supported by the evidence of other prosecution witnesses. *Balasingam v. PP* (refd). (paras 22-24)

- (2) Although this court stated in *Muhammed Hassan v. PP* that “there must be an express affirmative finding (as opposed to legal presumption) of possession as understood in criminal law, based on evidence”, it should not be understood that such statement excludes and makes irrelevant any conduct of an accused at the time of his arrest. Conduct at the time of arrest, if admitted in evidence as discussed in *Parlan Dadeh v. PP*, is crucial in determining the existence of *mens rea* possession under the Act. In the present case, the trial judge found as being relevant, and thus admitted, the appellant’s conduct of running towards the bathroom and throwing something upon PW5’s entry into his bedroom. Since there was no plausible explanation given by the appellant or any other probable inference based on the evidence adduced as a whole, such conduct was taken or inferred by the trial judge as indicative of *mens rea* possession of the dangerous drug found in the bathroom. The facts of the case also show that the appellant had sole control and occupation of the bedroom at the material time. There was, hence, no merit in the appellant’s submission that the present case was at most one of possession similar to *Muhammed Hassan (supra)*. *Muhammed Hassan v. PP* (dist); *Parlan Dadeh v. PP* (foll); *Teng Howe Sing v. PP* (foll); *Abdullah Zawawi Yusoff v. PP* (refd). (paras 30-34)
- (3) Despite the ruling of the trial judge, the statement that followed it should be taken into account. It was clear that the trial judge went on to say that the court was satisfied that the prosecution had proved the charge preferred against the appellant without any reasonable doubt. It should also be noted in this case that the burden was on the appellant to rebut the presumption of trafficking on the balance of probabilities. Anyway, the expression “as to the truth of the prosecution’s case” is quite commonly used by judges and should hardly be taken as a misdirection. It does not demand a heavier burden on the defence. Thus, there was no merit in the second issue. The trial judge’s usage of the expression complained of had not occasioned any miscarriage of justice that would warrant the setting aside of the conviction. In any event, the present case was substantially factual and an appellate court should be slow in interfering with the trial judge’s findings of fact. *Tan Boon Kean v. PP* (refd); *Tan Sri Tan Hian Tsin v. PP* (refd); *Mohamed Kunju v. PP* (refd); *Mohamed Yatin Abu Bakar v. PP* (refd). (paras 38-42)

A ***Bahasa Malaysia Translation Of Headnotes***

- Perayu telah disabitkan dan dikenakan hukuman mati oleh Mahkamah Tinggi atas tuduhan mengedar 117.5 gram methamphetamine di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta'). Rayuannya ke Mahkamah Rayuan ditolak, mengakibatkan rayuan semasa di mana isu-isu berikut dibangkitkan:
- B (i) kebolehpercayaan bukti pegawai menangkap ('PW5') dan sama ada *mens rea* pemilikan telah dibuktikan dan (ii) salah arahan pada standard pembuktian oleh hakim perbicaraan. Tentang isu kebolehpercayaan PW5, perayu menghujahkan, antara lain, bahawa hakim seharusnya berhati-hati dalam menerima bukti PW5 kerana testimoninya adalah amat penting untuk kes pendakwaan. Ia kemudiannya dikatakan bahawa dalam mencapai kesimpulan di atas isu *mens rea* pemilikan, hakim perbicaraan khilaf dalam hanya menerima bahawa tindakan perayu berlari ke bilik mandi dan membuang sesuatu adalah kelakuan atau tindakan terang-terangan yang membuktikan pengetahuan. (PW5 telah kemudiannya menjumpai tiga pakej mengandungi dadah terlarang dalam bilik mandi tersebut). Berhubungan dengan isu kedua yang dibangkitkan,
- C perayu menegaskan bahawa hakim perbicaraan melakukan suatu salah arahan ketika memutuskan bahawa pembelaan gagal menimbulkan keraguan terhadap kebenaran kes pendakwaan.
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Diputuskan (menolak rayuan, dan mengesahkan sabitan dan hukuman mahkamah perbicaraan)

- F **Oleh Richard Malanjum HB (Sabah & Sarawak) menyampaikan penghakiman mahkamah:**

- (1) Dari keterangan yang direkodkan, tidak ada asas untuk mengatakan bahawa hakim tidak berhati-hati dan terlalu bersedia untuk menerima bukti PW5 dalam narasi tentang peristiwa yang membawa kepada penemuan pakej di bilik mandi dalam bilik tidur perayu. Bahkan, tidak ada bukti yang menunjukkan bahawa ia tidak munasabah dan tidak logik bagi hakim untuk percaya dan menerima sepenuhnya testimoni PW5's. Oleh yang demikian, ini bukanlah kes di mana dapatan bersama fakta mahkamah bawahan harus diusik. Walaupun PW5, berdasarkan fakta, pergi ke rumah pemohon dengan maklumat yang diterima dan dengan demikian berminat untuk mengetahui jika maklumat itu benar, itu tidak menjadikannya saksi yang tidak boleh dipercayai. PW5 pergi ke rumah tersebut
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dengan kakitangan polis lain dan tidak ada apa-apa yang dikemukakan untuk menunjukkan bahawa PW5 mempunyai alasan untuk menuduh perayu melakukan apa-apa kesalahan. Tiada keterangan yang dikemukakan untuk menunjukkan bahawa PW5 dahulunya kenal perayu. Oleh itu, tiada merit dalam isu yang berkaitan dengan kebolehpercayaan PW5 sebagai saksi yang membuktikan elemen-elemen penting kesalahan seperti yang dituduhkan. Ia juga perlu diambil perhatian bahawa keterangan PW5 disokong oleh keterangan saksi-saksi pendakwaan yang lain. *Balasingam v. PP* (dirujuk).

- (2) Walaupun mahkamah ini menyatakan dalam *Muhammed Hassan v. PP* bahawa “mesti ada penemuan afirmatif yang nyata (bertentangan dengan anggapan undang-undang) pemilikan seperti yang difahami dalam undang-undang jenayah, berdasarkan keterangan”, ia tidak sepatutnya difahami bahawa kenyataan tersebut mengecualikan dan menjadikan tidak relevan apa-apa kelakuan seseorang tertuduh pada masa penangkapannya. Kelakuan pada masa penangkapan, jika diterima dalam keterangan seperti yang dijelaskan dalam *Parlan Dadeh v. PP*, sangat penting dalam menentukan kewujudan *mens rea* pemilikan di bawah Akta. Dalam kes semasa, hakim perbicaraan mendapati sebagai relevan, dan dengan demikian menerima, kelakuan perayu berlari ke bilik mandi dan membuang sesuatu semasa PW5 memasuki bilik tidurnya. Oleh kerana tidak ada penjelasan munasabah yang diberikan oleh perayu atau inferens kemungkinan lain berdasarkan keterangan yang dikemukakan secara keseluruhan, kelakuan sebegitu diambil atau disimpulkan oleh hakim perbicaraan sebagai membuktikan *mens rea* pemilikan dadah berbahaya yang ditemui di bilik mandi. Fakta-fakta kes juga membuktikan bahawa perayu mempunyai kawalan dan kediaman tunggal bilik tidur pada masa yang material. Oleh yang demikian, tiada merit dalam hujahan perayu bahawa kes semasa adalah paling banyak pun suatu kes pemilikan seperti *Muhammad Hassan (supra)*. *Muhammed Hassan v. PP* (dibezakan); *Parlan Dadeh v. PP* (diikuti); *Teng Howe Sing v. PP* (diikuti); *Abdullah Zawawi Yusoff v. PP* (dirujuk).

- (3) Meskipun keputusan yang dibuat oleh hakim perbicaraan, kenyataan selepas itu harus diambil kira. Ia adalah jelas bahawa hakim perbicaraan meneruskan dengan mengatakan bahawa mahkamah berpuashati bahawa pendakwaan telah membuktikan

- A pertuduhan terhadap perayu tanpa sebarang keraguan munasabah. Ia juga perlu diambil perhatian dalam kes ini bahawa beban berada atas perayu untuk mematahkan anggapan mengedar atas imbalan kebarangkalian. Walau bagaimanapun, ungkapan “pada kebenaran kes pendakwaan” biasa digunakan oleh hakim-hakim dan tidak seharusnya diambil sebagai suatu salah arahan.
- B Ini tidak mengenakan beban yang lebih berat ke atas pembelaan. Oleh itu, tidak ada merit dalam isu kedua. Penggunaan ungkapan oleh hakim perbicaraan yang diadu tentang tidak mengakibatkan apa-apa salah laksana keadilan yang mewajarkan pengeneapan sabitan tersebut. Walau apapun, kes semasa adalah secara substansial bersifat faktual dan sesuatu mahkamah rayuan seharusnya berhati-hati mengusik dapatan fakta hakim perbicaraan. *Tan Boon Kean v. PP* (dirujuk); *Tan Sri Tan Hian Tsin v. PP* (dirujuk); *Mohamed Kunju v. PP* (dirujuk); *Mohamed Yati Abu Bakar v. PP* (dirujuk).
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Case(s) referred to:

- Abdullah Zawawi Yusoff v. PP* [1993] 4 CLJ 1 SC (*refd*)
Balasingham v. PP [1959] 1 LNS 8 HC (*refd*)
DP Vijandran v. Public Prosecutor [1999] 1 CLJ 691 CA (*refd*)
- E *Mohamed Kunju v. PP* [1966] 1 MLJ 271 (*refd*)
Mohamed Yatin Abu Bakar v. PP [1950] MLJ 57 HC (*refd*)
Muhammed Hassan v. PP [1998] 2 CLJ 170 FC (*dist*)
Parlan Dadeh v. PP [2009] 1 CLJ 717 FC (*fol*)
Tan Boon Kean v. PP [1995] 4 CLJ 456 FC (*refd*)
- F *Tan Sri Tan Hian Tsin v. PP* [1979] 1 MLJ 73 FC (*refd*)
Tara Singh v. Public Prosecutor [1954] 1 LNS 113 (*refd*)
Teng Howe Sing v. PP [2009] 3 CLJ 733 FC (*fol*)
Tengku Mahmood v. PP [1974] 1 LNS 176 (*refd*)
The ‘Eurymedon’ [1942] 73 Lloyd LR 217 (*refd*)

G Legislation referred to:

Courts of Judicature Act 1964, s. 92
 Dangerous Drugs Act 1952, ss. 37(da)(xvi), 39B(1)(a), (2)

For the appellant - Karpal Singh (Ramkarpal Singh with him); M/s Rajit Gill & Co

H *For the respondent - Saiful Edris Hj Zainuddin DPP*

[Appeal from Court of Appeal, Criminal Appeal No: P-05-73-2003]

[Editor’s note: For the Court of Appeal judgment, please see Wong Joo Sen v. PP [2008] 5 CLJ 375.]

I *Reported by Suresh Nathan*

JUDGMENT

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Richard Malanjum CJ (Sabah & Sarawak):

Introduction

[1] The appellant was convicted and sentenced to death by the High Court Pulau Pinang on 29 July 2003 on a charge for trafficking 117.5 grams methamphetamine under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act) and punishable under s. 39B(2) of the same Act. His appeal to the Court of Appeal was dismissed on 29 July 2008. He now appeals to this court.

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[2] The charge reads:

Bahawa kamu pada 10 Mac 2001 jam lebih kurang 7.00 malam di alamat 1184, Jalan Satu, Mukim 6, Kepala Batas, di dalam Daerah Seberang Perai Utara, di dalam Negeri Pulau Pinang, telah mengedar dadah berbahaya iaitu Methamphetamine seberat 117.5 gram, dan oleh itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

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Background Facts

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[3] Acting on information received, the police party led by Chief Inspector Muniandy a/l Marimuthu (PW5) raided a house at No. 1184, Jalan Satu, Mukim 6, Kepala Batas, Seberang Perai Utara, Pulau Pinang on 10 March 2001.

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[4] On arrival at the address the police found the gate and the front door opened. The raiding party was divided into three teams. One team went to guard the rear of the house while another kept watch the front. PW5 and two others Sjn. Che Hasan bin Dolah (PW6) and L/Kpl Ahmad Kushairi (PW8) entered the open front door of the house.

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[5] Upon entry PW5 found five ladies in the dining area playing a game of cards. PW5 identified himself to one of the ladies. He then proceeded to a bedroom on the right at the rear portion of the house together with PW6. PW8 was directed to guard the rear exit door of the house.

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- A [6] PW5 knocked at the door of the bedroom and shouted 'police, open the door' twice. There was no response. PW5 and PW6 therefore kicked the door and after the second kick managed to open it.
- B [7] PW5 rushed inside the room. As he entered the room PW5 saw the Appellant running away from the bed towards the front door of the attached bathroom and was throwing something from his right hand in the direction of the bathroom. PW5 proceeded to arrest the appellant with the assistance of PW6 after a brief struggle inside the bathroom.
- C [8] PW5 proceeded to investigate in the bathroom and he found three translucent plastic packages. Later upon examination of the packages in his office in the presence of the appellant PW5 found that there were 6000 pills in the three packages with the initials 'WY' stamped at the back of each pill. Each package was measured 4" x 3" in size containing two bundles of five blue plastic packets. The bundles were bound together by a rubber band. In each of the five blue plastic packets contained 200 pills. There were 30 blue plastic packets altogether.
- D [9] The packages together with pills recovered were sent to the Chemistry Department for analysis. The Chemist, Puan Elliza binte Mat Nor (PW3), did the analysis and found the pills to be methamphetamine with a net weight of 117.5 grams, a dangerous drug listed in Part III of the First Schedule of the Act.
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Findings Of The Trial High Court

- G [10] On the issue of custody, control and possession of the dangerous drug in question the learned trial judge, without relying on the statutory presumption on possession, ruled:
- H a. that the action of throwing the translucent plastic packages indicated that the appellant had the custody and control of the pills since the packages were held by him in his hand before throwing them away;
- I b. that the act of throwing the pills showed that the appellant had the physical custody and the power to dispose of those pills; and

- c. that the act of not opening the door despite the shouts of PW5 and the subsequent struggle with PW5 and PW6 indicated that the appellant knew that the translucent plastic packages containing the 6000 'WY' pills were methamphetamine a type of dangerous drug. A

[11] The learned trial judge did not find any break in the chain of evidence as regards the handling of the recovered drug from its recovery until the analysis by the Chemist PW3. And that the Chemist had analyzed it and found it to be a type of dangerous drug as defined under the Act. B C

[12] In respect of the presumption of trafficking under s. 37(da) (xvi) of the Act the learned trial judge held that the drug found with the appellant not only had exceeded the amount as prescribed under the presumption but that the quantity was such that the irresistible inference was that the appellant had the drug for the purpose of trafficking, that is, for sale or supply to others. The burden had therefore shifted to the appellant to rebut on the balance of probabilities. D

[13] In his defence the appellant testified: E

- a. that he had no knowledge of the drug;
- b. that the drug did not belong to him;
- c. that the drug was in fact planted in the toilet by his friend Ah Nam; and F
- d. that he did not inform the police about Ah Nam planting the drug in his room as he came to know of it after his mother Chuah Siok Tee (DW2) informed him. G

[14] DW2 testified that on 10 March 2001 at about 1pm, Ah Nam came to the house looking for the appellant. However the Appellant was not well so Ah Nam left. At about 5pm on the same day Ah Nam returned to the house carrying a plastic bag in his hand. After DW2 had informed him that the appellant was still sleeping, he retrieved a key to the appellant's bedroom from a table and went inside. When Ah Nam came out of the room he did not carry anything with him. H

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A [15] The learned trial judge did not believe the version of the defence including the evidence of DW2 and did not find the defence having cast any reasonable doubt on the case for the prosecution. The appellant was therefore convicted and sentenced for the offence as charged.

B **Before The Court Of Appeal**

[16] The appellant appealed to the Court of Appeal. His appeal was dismissed. The Court of Appeal held:

- C a. that the learned trial judge did not err in coming to her findings on the totality of the evidence adduced;
- b. that it had no reason to disturb the findings of the learned trial judge that the appellant had exclusive care and occupation of the room in which he was arrested since there was no one else who had access into the said room;
- D c. that the learned trial judge had in her mind the legal principles on the issue of possession and the physical and mental elements necessary to constitute *mens rea* possession of the dangerous drug;
- E d. that the on the factual matrix of this case there was no necessity to rely on the statutory presumptions under the Act to establish possession of the dangerous drug by the appellant;
- F e. that while there was no direct evidence of trafficking, there was no basis to disturb the finding of the learned trial judge that the appellant was trafficking in the dangerous drug because:
- G i. the amount of drug found with the appellant exceeded twice the amount which attracted the invocation of the presumption of trafficking under s. 37(da)(xvi) of the Act;
- ii. the appellant did not lead any evidence that he was a drug addict, hence the issue of him in possession of the drug for his own consumption did not arise in rebuttal of the statutory presumption of trafficking under s. 37(da)(xvi) of the Act; and
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- iii. that taking into consideration the large quantity of pills (6000) in the three packages recovered and the manner in which they were packed, that is, in 30 small blue plastic packets, each containing 200 pills, irresistibly led to an inference that the drug were intended for distribution loosely or in packets (by sale or otherwise) to third parties known or unknown to the appellant if not for the seizure by the police;

and

- f. that the conclusion of the learned trial judge was correct in that the appellant and DW2 could not be believed as to the existence and the role played by a person called Ah Nam. It could not be believed that DW2 did not even bother to stop or protest the alleged Ah Nam from entering the bedroom of the appellant unimpeded.

Before This Court

[17] There are 13 grounds of appeal submitted in the petition of appeal. However, learned counsel for the appellant in his submission summarized the grounds into two main issues, namely,

- i. on the reliability of the evidence of PW5 and whether *mens rea* possession had been established; and
- ii. there was misdirection on the standard of proof by the learned trial judge.

[18] On the issue of reliability of PW5 it was submitted by learned counsel for the appellant, *inter alia*:

- a. that the learned trial judge should have been cautious in accepting the evidence of PW5 since his testimony was pivotal to the case for the prosecution;
- b. that it should have been considered that what was recovered in the bathroom was the consequence of information received earlier on;
- c. that PW5 was unworthy of credit; and

- A d. notwithstanding that there were concurrent findings of facts by the trial court and the Court of Appeal this court could depart from such finding on the authority of *D.P Vijandran v. Public Prosecutor* [1999] 1 CLJ 691 at p. 695. In that case the Court of Appeal agreed that it is the settled practice 'of this court not to interfere with concurrent findings of fact save in very rare cases. If, for instance, it could be shown that the course of events affirmed by the trial judge could not have occurred, that would be a good reason for reversing his view. See, *The 'Eurymedon'* [1942] 73 Lloyd LR 217; *Tara Singh v. Public Prosecutor* [1954] 1 LNS 113; *Tengku Mahmood v. Public Prosecutor* [1974] 1 LNS 176.'
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- [19] In reply learned Deputy Public Prosecutor contended that PW5 was found by the learned trial judge to be a truthful and honest witness. Further there is no presumption that a witness of fact including an interested witness should not be believed without any cogent reason to say otherwise. The case of *Balasingham v. Public Prosecutor* [1959] 1 LNS 8 was cited in support.
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- [20] In her judgment the learned trial judge considered the overall evidence adduced including that of the defence before coming to her final conclusion on the guilt or innocence of the appellant. Each of the elements for the offence as charged was considered based on the evidence adduced.
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- [21] For instance on the element of possession of the dangerous drug the learned trial judge was very careful when considering the events, including the evidence of PW5, leading to the finding of the packages in the bathroom of the bedroom of the appellant. The Court of Appeal was therefore correct to conclude that in this case 'on the factual matrix, there was no necessity to rely on any statutory presumptions under the Act to establish possession of the drugs' by the appellant.
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- [22] Thus, from the evidence recorded we find no basis to say that the learned trial judge was not careful and too ready to accept the evidence of PW5 in his narration of the events leading to the recovery of the packages in the bathroom of the bedroom of the appellant. In fact there was no evidence to suggest that it was unreasonable and illogical for the learned trial judge to have believed and accepted wholly the testimony of PW5. As such we do not think this is a case in which we should interfere with the concurrent findings of facts of the courts below.
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[23] No doubt PW5 went to the house of the appellant armed with information received and was thus interested to find out if the information was correct. However that should not necessarily make him an untrustworthy witness. (See: *Balasingham v. Public Prosecutor (supra)*). It should be noted that PW5 went to the house with other police personnel. There was nothing adduced to show the slightest indication that PW5 had a reason to accuse the appellant of any offence. There was also no evidence adduced to show that PW5 had known the appellant before.

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[24] Thus we find no merit in the issue pertaining to the reliability of PW5 as a witness establishing the key elements of the offence as charged. It should also be noted that the evidence of PW5 was supported by the evidence of other witnesses such as PW1, PW2, PW4, PW6, PW7, PW8 and PW10.

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[25] It was next submitted that in coming to her conclusion on the issue of *mens rea* possession the learned trial judge erred in merely accepting that the act of the appellant in running to the bathroom and throwing something as being a conduct or an overt act indicative of knowledge. We are therefore urged to consider the cases of *Parlan Dadeh v. PP* [2009] 1 CLJ 717 and *Muhammed Hassan v. PP* [1998] 2 CLJ 170 in relation to the point on overt act or conduct, knowledge and possession and the legal implications thereof under the Act.

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[26] In *Parlan Dadeh (supra)* this court said this at pp. 742-748:

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Evidence of conduct is admissible under s. 8 of the evidence Act 1950 ('s. 8') which reads as follows:

(1) Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

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(2) The conduct of any party, or of any agent to any party, to any suit or proceeding in reference to that suit or proceeding or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant if the conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

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A Evidence of conduct admissible under s. 8 may be explained as provided in s. 9 of the Evidence Act 1950 ('s. 9') which reads as follows:

B Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of any thing or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened or which show the relation of parties by whom any such fact was transacted, are relevant so far as they are necessary for that purpose.

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D The law relating to evidence of conduct is thus patent. If there is no evidence to show that the conduct is influenced by any fact in issue or relevant fact as required by s. 8 then it is not admissible as it would then be an equivocal act justifying inferences favourable to the accused being drawn. If it satisfies the requirement of s 8 it is admissible. It must be observed that the degree of proof required to establish evidence of conduct would depend on the nature of the conduct. Conduct like the flight of an accused is a more positive act and is easily established. On the other hand conduct like the accused looking stunned, nervous, scared or frightened is very often a matter of perception and more detailed evidence may be required. Once admitted the court cannot resort to any other explanation for the conduct or draw inferences on its own accord to render it inadmissible. The onus is on the accused to explain his conduct pursuant to s. 9. Such explanation must not be in their barest possible form, but with a reasonable fullness of detail and circumstance (see *R v. Stephenson* [1904] 68 JP 524). The onus may be discharged even in the course of the case for the prosecution, for example, by way of cross-examination of relevant witnesses. If not so done it can be discharged only at the defence stage. However, the evidence admissible under the section must be confined to what is necessary for the purposes enumerated. Illustration (c) to s. 9 explains the operation of this principle. It provides that when A is accused of a crime the fact that soon after the commission of the crime he absconded from his house is relevant. But the fact that at the time when he left home he had sudden and urgent business at the place to which he went, is relevant, as tending to explain the fact that he left home suddenly. The details of the business on which he left, however, are not relevant, except in so far as they are necessary to show that the business was sudden and urgent. If the explanation is accepted by the court then the inference arising from the conduct is rebutted. If it is not accepted or if the accused does not explain his conduct the inference remains unrebutted.

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It is now appropriate to consider the rationale of the court in explaining the conduct of the accused in running away in *Abdullah Zawawi bin Yusoff* which formed the basis of the submission of the appellant. In that case the drugs were found in a house occupied by the accused, his wife and a third person. The court considered the evidence of possible access to the house by others, and in distinguishing the case from *Deputy Public Prosecutor v. Brooks* [1974] 2 All ER 840, held that the conduct of the accused in running away was equally consistent with him having been in a state of pure panic even though he did not offer any explanation himself. On the other hand in *Deputy Public Prosecutor v. Brooks* the accused was in the driver's seat of a stationary van with several others. There were drugs in the van. When the police approached the van all of them ran. The conduct of the accused in running away was held against him. The difference in both the cases is that in *Abdullah Zawawi bin Yusoff* there was no evidence to show that the act of the accused in running away was influenced by any fact in issue or relevant fact within the meaning of s. 8 in view of the possibility of access to the house by others. It is therefore not admissible on this ground as it is equivocal thereby justifying an inference in favour of the accused being drawn and ought to have been so ruled at an earlier stage of the trial. The case of *Abdullah Zawawi bin Yusoff* is therefore authority only to this extent. On the other hand in *Deputy Public Prosecutor v. Brooks* there was evidence to show that the drugs were in the physical custody and control of the accused and his conduct of running away thus comes, in the Malaysian context, within the meaning of s. 8. It is therefore admissible and cannot be explained away by the court itself by offering an explanation which is consistent with the innocence of the accused. The explanation must be offered by the accused himself as required by s. 9.

In this case the reaction of the appellant in looking stunned or shocked upon being approached by the police is clearly admissible under s. 8 since it has a direct bearing on the fact in issue as the drugs found were tucked away in the front of the jeans worn by him. The explanation for his reaction must therefore be offered by he himself as required by s. 9. The court cannot, on its own, offer an explanation for his reaction. However, in his defence the appellant did not offer any explanation at all for his reaction upon being approached by the police. It can therefore be validly used as evidence against him. The inference to be drawn from the evidence of conduct of the appellant against the background of the other evidence is that he knew what he was carrying (see *Deputy Public Prosecutor v. Brooks*). It follows that the stand taken by the appellant in relation to the evidence of conduct is not sustainable. Be that as it may, the evidence of conduct in this case is not very significant in

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- A view of the manner in which the appellant carried the drugs on his person from which it can reasonably be inferred that he had knowledge of the drugs in his possession (see the cases referred to earlier, and, in particular, *Tunde Apatira and Public Prosecutor v. Abdul Rahman bin Akif*).
- B [27] It was thus submitted that in considering the issue of *mens rea* possession in *Parlan bin Dadeh* this court did not take into account the view expressed by this court on the same issue in *Muhammed bin Hassan v. Public Prosecutor (supra)*. In that case this court said this at pp. 187-195:
- C In other words, it was the contention for the appellant that in order to invoke s. 37(da), there must be an actual finding of possession as opposed to 'deemed' possession; otherwise there would be one presumption upon another presumption, which was not what the
- D two subsections permitted. As persuasive authorities, reference were made to ss. 17 and 18(1) and (2) of the Misuse of Drugs Act (Ch 185) of Singapore, Revised Edition 1997 ('the Singapore Act') and the Singapore case of *Low Kok Wai v. PP* [1994] 1 SLR 676.
- ...
- E In our view, there is a clear undeniable distinction between the word 'deemed' used in s. 37(d) and the word 'found' employed in s. 37(da) of the Act. The 'deemed' state of affairs in s. 37(d) (ie deemed possession and deemed knowledge) is by operation of law and there is no necessity to prove how that particular state of affairs
- F is arrived at. There need only to be established the basic or primary facts necessary to give rise to that state of affairs, ie the finding of custody or control. Such presumptions as under s. 37(d) (and, for that matter, the one under s. 37(da)) are sometimes described as 'compelling presumptions' in that upon proof of certain facts by a
- G party (in our present case, proof of custody or control in s. 37(d) by the prosecution), the court must in law draw a presumption in its favour (ie presumptions of possession and knowledge) unless the other party proves the contrary. Such a presumption has the compelling force of law. It is a deduction which the law requires the trial court to make. On the other hand, the word 'found' in the
- H opening phrase of s. 37(da) connotes a finding after a trial by the court.
- I Furthermore, the basic or primary facts needed to raise 'deemed' possession and 'deemed' knowledge under s. 37(d) of the Act and those required to raise 'presumed ... trafficking' under s. 37(da) are different. To come to the presumptions of possession and knowledge under s. 37(d), one need only to arrive at a finding of having had 'in custody or under ... control anything whatsoever

containing' the drug (as opposed to the drug itself) whereas to arrive at the presumption of 'trafficking' under s. 37(da), a finding of being 'in possession' of the drug is necessary (in addition, of course, to proof of the relevant minimum quantity specified). In view of the above differences, it would be unduly harsh and oppressive to construe the automatic application of presumption upon presumption as contended by the learned deputy public prosecutor – a construction that ought to be adopted only if, upon the wordings of the two subsections, such an intention of the Parliament is clear, which, in our opinion, is not.

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In our view, to constitute 'possession' under s. 37(da) of the Act, so as to be capable of forming one of the ingredients thereunder thereby giving rise to the presumption of trafficking, there must be an express affirmative finding (as opposed to legal presumption) of possession as understood in criminal law, based on evidence.

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Having considered the submissions of counsel and the learned deputy public prosecutor, and the law applicable including the rules of construction of penal statutes, we were of the view that the word 'found' in s. 37(d) must bear the same meaning as the word 'found' in s. 37(da). Both require evidential materials in attaining proof thereof and are vastly different from the word 'deemed' employed in the said s. 37(d).

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In our view, on the wording of s. 37(da) as it stands, to read the presumption of possession (ie, possession as understood in criminal law, with knowledge) provided in s. 37(d) into s. 37(da) so as to invoke against an accused a further presumption of trafficking (ie presumption upon presumption) would not only be ascribing to the phrase 'found in possession' in s. 37(da) a meaning wider than it ordinarily bears but would also be against the established principles of construction of penal statutes and unduly harsh and oppressive against the accused. We are not unaware that, as a general principle, a statute may place the burden of proof on an accused by necessary implication and without doing so expressly. This depends on the construction of the particular legislation. But a court should be extremely cautious and slow to infer from a statute that Parliament intended to impose on the defendant an onerous duty to prove his innocence in a criminal case. Furthermore, offences involving the trafficking of dangerous drugs are among the most serious in the criminal calendar. Any ambiguity in s. 37(da) should be resolved in favour of the accused by placing the burden of proving possession of the substances involved on the prosecution.

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- A We would further add that in so construing as we do, we see no injustice to the prosecution. In a proper case where the evidence so warrants and the amount of the dangerous drug reaches or exceeds the quantity specified in s. 37(da), there is nothing to prevent a trial court from coming to a factual finding of possession as understood in criminal law, thereby attracting the presumption of trafficking under the said s. 37(da) which, of course, is rebuttable.
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- [28] Foremost, it should be appreciated that *Muhammed Hassan (supra)* was primarily dealing with the question of whether it should be permitted to invoke both the presumptions of possession and trafficking under the Act to find the guilt of an accused. And this court in that case opined that ‘to constitute ‘possession’ under s. 37(da) of the Act, so as to be capable of forming one of the ingredients thereunder thereby giving rise to the presumption of trafficking, there must be an express affirmative finding (as opposed to legal presumption) of possession as understood in criminal law, based on evidence’.
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- [29] Whereas in *Parlan bin Dadeh* this court was more concerned with the admissibility of conduct of an accused person at the time of his arrest in relation to proof of the element of possession under the Act. As such it is quite understandable why this court did not make any direct reference to *Muhammed Hassan (supra)* in *Parlan bin Dadeh (supra)*.
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- [30] And although this court stated that ‘there must be an express affirmative finding (as opposed to legal presumption) of possession as understood in criminal law, based on evidence’ it should not be understood that such statement excludes and makes irrelevant any conduct of an accused at the time of his arrest. Conduct at the time of arrest, if admitted in evidence as discussed in *Parlan bin Dadeh*, is crucial in determining the existence of *mens rea* possession under the Act. In other words, conduct at the time of arrest or an overt act is of evidential value and fact sensitive. However, it should not be said that invariably an overt act equals to knowledge.
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- [31] Thus, in the present case the learned trial judge found as being relevant and thus admitted the conduct of the Appellant of running towards the bathroom and throwing something upon the entry of PW5 into his bedroom. And there being no plausible explanation given by the appellant or other probable inference based on the evidence adduced as a whole (see: *Abdullah Zawawi bin Yusoff*
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v. Public Prosecutor [1993] 4 CLJ 1) such conduct was taken or inferred by the learned trial judge as indicative of mens rea possession of the dangerous drug found in the bathroom.

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[32] The version of DW2 was also rightly disbelieved by the learned trial judge. In our view it was not a plausible explanation on the conduct of the appellant upon entry by PW5 into the bedroom. DW2, the mother of the appellant, testified that a person known to her as Ah Nam had earlier on entered the bedroom of the appellant opening the door with a key from a table. Ah Nam was alleged to have carried a plastic bag into the bedroom and leaving without it. DW2 did not say whether Ah Nam locked the bedroom when he left or it was kept unlocked. In any event the fact is that the door was locked. And if indeed there was a key used by the alleged Ah Nam DW2 could have told PW5 to use the same key to open the bedroom instead of PW5 and PW6 having to kick the door twice to open it. Further, other than the alleged Ah Nam having entered the bedroom of the appellant there was no other assertion that it was accessed by any third party. In other words, the appellant had the sole control and occupation of the bedroom at the material time.

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[33] There is therefore no merit in the submission by learned counsel for the appellant that this present case is at most one of possession similar to *Muhammed Hassan (supra)*.

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[34] We would say that based on the evidence adduced this case is more consistent with the earlier cases decided by this court such as *Teng Howe Sing v. PP* [2009] 3 CLJ 733 in which the conduct of the accused involved the throwing away of the incriminating object in the hope of dissociating oneself from it was taken or inference made for knowledge on the element of possession under the Act.

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[35] In respect of the second issue raised, it was asserted that there was misdirection committed by the learned trial judge when she said this at p. 485 of the appeal record:

Mahkamah berpuashati bahawa pembelaan telah gagal menimbulkan satu keraguan yang munasabah dalam kebenaran kes pihak pendakwaan. Mahkamah berpuashati bahawa pihak pendakwaan telah membuktikan pertuduhan terhadap tertuduh tanpa sebarang keraguan munasabah. Tertuduh adalah didapati bersalah kerana telah melakukan kesalahan mengedar dadah berbahaya iaitu methamphetamine seberat 117.5 gram di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952.

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- A [36] According to learned counsel for the appellant it was misdirection when the learned trial judge ruled that the defence failed to cast doubt on the truth of the prosecution's case.
- B [37] In response learned Deputy Public Prosecutor contended that since s. 37(da) of the Act was involved the appellant had a higher burden to prove, namely, on the balance of probabilities, to rebut the presumption for trafficking. It was also urged that s. 92 of the Courts of Judicature Act 1964 should be invoked since there was no miscarriage of justice as to warrant the setting aside of the conviction of the appellant.
- C [38] In our view despite what the learned trial judge ruled the statement that followed it should be taken into account. It is clear that the learned trial judge went on to say that the court was satisfied that the prosecution had proved the charge preferred against the appellant without any reasonable doubt. It should also be noted in this case that the burden is on the appellant to rebut the presumption of trafficking on the balance of probabilities.
- D [39] Anyway, the expression 'as to the truth of the prosecution case' is quite commonly used by judges in relation to a question: 'Does the defence raise a reasonable doubt as to the truth of the prosecution case or as to the accused's guilt?' (See: *Tan Boon Kean v. Public Prosecutor* [1995] 4 CLJ 456). Such usage should hardly be objectionable or taken as misdirection. It does not demand a heavier burden on the defence.
- E [40] For instance, in *Tan Sri Tan Hian Tsin v. Public Prosecutor* [1978] 1 LNS 199; [1979] 1 MLJ 73 Chang Min Tat FJ said this at p. 78:
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- G It is obvious that to the learned judge the defence had cast no doubt as to the truth of the prosecution case, even given the premise of the debt to Hwa Chiang which he assumed.
- H In *Mohamed Kunju v. Public Prosecutor* [1966] 1 LNS 105; [1966] 1 MLJ 271 Azlan Shah J (as he then was) ruled thus at p. 274:
- I Having regard to the case as a whole, I was satisfied that the defence had not raised a reasonable doubt as to the truth of the prosecution case or as to the accused's own guilt. I therefore found him guilty and convicted him.

And in *Mohamed Yatin bin Abu Bakar v. Public Prosecutor* [1949] 1 LNS 50; [1950] MLJ 57 Spenser-Wilkinson J at p. 59 explained:

In an ordinary case, where no special burden of proof or explanation is by law cast upon the accused, his position is more favourable than it is in those cases where the law presumes something against him. The principle laid down in the recent English cases, particularly *Mancini v. Director of Public Prosecutions* appears to me to be that, where no special onus is cast by law upon the accused, then, if his story has the effect of raising a reasonable doubt as to the truth of the prosecution case, he is entitled to an acquittal; and this is the "ordinary rule" which is referred to in the passage above quoted from *Rex v. Garth*. In this country, at the close of the case for the prosecution the Court will not call upon the accused for his defence unless the evidence of the prosecution witnesses is, in the first instance, believed. If, when called upon for his defence the accused gives evidence, then the question is, not which story is to be believed, but whether, even if the Court is not inclined to accept all that the accused has said, his evidence does not raise a reasonable doubt as to the truth of the prosecution evidence or as to the accused's guilt.'

[41] Hence, on the second issue raised we find no merit in it. We are also inclined to agree with the learned Deputy Public Prosecutor that no miscarriage of justice has been occasioned on the usage by the learned trial judge of the expression complained of so as to warrant the setting aside of the conviction.

[42] In any event the present case is substantially factual and being an appellate court we should be slow in interfering with the findings of facts by the learned trial judge.

Conclusion

[43] Accordingly and for the reasons hereinabove we dismiss this appeal. The conviction as found and the sentence passed by the trial court are hereby affirmed.

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